Law and War

Law and the Concept of “Wartime”

Counterinsurgents and the Laws of War

Modern War and Humanitarian Law

ALSO IN THIS ISSUE:

Understanding Peace Treaties

War and Peace

Holding Corporations Accountable
A one-year subscription to Insights on Law & Society costs $34 and includes three issues of the print magazine and access to online resources. For subscription information, visit www.insightsmagazine.org, or contact the American Bar Association Division for Public Education, 321 N. Clark St., Chicago, IL 60654; 312-988-5735; www.americanbar.org/publiced.


The American Bar Association is a not-for-profit corporation. All rights reserved. Printed in the United States of America. Printed on recycled paper.


Insights on Law & Society is published three times each year by the American Bar Association Division for Public Education. The mission of the Division is to educate the public about law and its role in society. Insights helps high school teachers of civics, government, history, and law; law-related education program developers; and others working with the public to teach about law and legal issues. Funding for this issue has been provided by the American Bar Association Fund for Justice and Education. We are grateful for this support.

The views expressed in this document are those of the authors and have not been approved by the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education. This publication may be reproduced for education activities but may not be sold.

Kim J. Askew
Chair, American Bar Association
Standing Committee on Public Education

Mabel McKinney-Browning
Director, American Bar Association
Division for Public Education

Tiffany Middleton
Managing Editor

Zachary Stedt
Digital Publishing Manager

Law and the Concept of “Wartime”
By Mary L. Dudziak
Historically, “wartime” has been viewed as an exception to the norm, “peacetime.” Each has implications for the rule of law. So what happens when we cannot tell what “time” it is?

Why Counterinsurgents Should Follow the Laws of War
By Ganesh Sitaraman
The term “counterinsurgency” appears frequently in today’s media. What is it? How does law play a central role in one of today’s most current military issues?

Verdict of Battle: Modern War and Humanitarian Law
By James Q. Whitman
Why are modern wars so much more uncontrolled, sprawling, and awful than the wars of the eighteenth century or early nineteenth century? To answer this question, one must understand the battle as well as the growth of international humanitarian law.

DEPARTMENTS

Director’s Note

Teaching Legal Docs: Understanding Peace Treaties
A quick guide to how peace treaties are different from other types of documents involved with conflict resolution.

Perspectives: Is There Still a Legal Distinction Between War and Peace?
Experts Linda Bishai and Amos Guiora weigh in on the question.

Law Review: Holding Corporations Accountable: Corporate Liability for Human Rights Violations
Jonathan Hafetz explores how possible corporate liabilities for human rights violations are reshaping modern law.

Profile: Karen Korematsu
An interview with the daughter of Fred Korematsu about her famous father, his case, and the Korematsu Institute for Civil Rights and Education.

What’s Online?

LEARNING GATEWAYS

Wartime or Peacetime?

Lee v. Madigan Case Study
The U.S. Supreme Court had to determine what defined wartime and peacetime in 1949. Students analyze the majority and dissenting opinions from the case.

What Is “Counterinsurgency”?
Students use charts from the U.S. Army Counterinsurgency handbook to determine what “counterinsurgency” is, how it is executed, and how it relates to the rule of law.

Applying the Rules of International Humanitarian Law
How do the rules of international humanitarian law affect soldiers and civilians? Refugees and prisoners? Students learn about the rules and then study photographs to apply them in real situations.
War has played a central part in American history but has especially been part of our culture for the past decade. War is many things, not the least of all a legal matter. This issue of Insights will explore the relationship between law and war.

The issue opens with an article from Mary L. Dudziak (Emory University School of Law), which explores the concept of “wartime” and its implications for law and national security. In our second article, Ganesh Sitaraman (Vanderbilt Law School) discusses counterinsurgency strategies that have become common references in today’s news media and how they are connected to the rule of law. Then, in “Verdict of Battle,” James Q. Whitman (Yale Law School) clearly and thoughtfully outlines how battlefields have changed from discrete spaces with clear winners to seemingly boundless spaces without any victory. He reflects on the increasing role of international humanitarian law in this shift. Each feature article also includes Learning Gateways, offering useful, strategies to help connect this rich content to your classroom.

In addition, Teaching Legal Docs takes a look at peace treaties, which often formally end wars, while Perspectives features experts who build on the arguments about the legal distinction between wartime and peacetime. The Law Review department features an article from Jonathan Hafetz (Seton Hall University School of Law), who outlines the complexities of holding corporations legally responsible for the human rights violations of their contractors. Rounding out the issue, we Profile the Korematsu Institute for Civil Rights and Education with a special extended interview with Karen Korematsu.

Remember that the magazine doesn’t stop with these pages. Check out the rich roundup of resources online at www.insightsmagazine.org. The website offers teachers additional instructional supports, including articles, lessons, and primary sources, and opportunities for continued discussion.

We continue to benefit from your feedback and ideas for the magazine, so keep them coming to our editor or me. Let us know about topics that you would like to see us tackle in future issues, and innovative classroom strategies that you have initiated to bring content alive for your students.

Enjoy,

Mabel McKinney-Browning
Mabel.MckinneyBrowning@americanbar.org
Law and the Concept of

Top: Announcement of Japan’s unconditional surrender during World War II, 1945; and bottom: American military service members celebrate in Paris following the Japanese surrender during World War II in 1945. Photos courtesy of the Library of Congress and National Archives, respectively.
Well over a decade after the 2001 terrorist attacks, are we still in a “long war” without an end in sight? Or does the category of “wartime” no longer fit our experience? These questions are not simply abstract and academic. In the aftermath of the Boston Marathon bombing, a debate erupted over whether a wartime or peacetime legal regime is appropriate. If the bombing was an act of war, perhaps the surviving suspect should be tried by a military commission rather than a civilian court. Answering this legal question requires us to think about what a wartime is, since this temporal concept—the time of war—has a legal consequence: it triggers application of an exceptional legal regime and the suspension of the normal rule of law.

Jeh C. Johnson, former General Counsel of the Defense Department, recently suggested that wartime is coming to an end. We may be reaching a “tipping point” in the war with Al Qaeda, he argued.

I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of Al Qaeda and its affiliates have been killed or captured and the group is no longer able to attempt or launch a strategic attack against the United States, such that Al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.

Johnson’s speech was heralded by some legal scholars as a recognition that exceptional measures such as detention without trial would come to an end before too long. Under the conventional formulation of wartimes and their impacts, when peace arrives we end the prioritization of security over rights, and the normal rule of law returns. Echoing this idea, Johnson remarked: “War’ must be regarded as a finite, extraordinary and unnatural state of affairs. ... Peace must be regarded as the norm toward which the human race continually strives.”

But Is Peacetime Really Our Normal Time?

“Peace” is believed to be something real and attainable—a place we can get to—even though peace is a concept that lacks its own definition, most often described as a negation of something else, the absence of war. After World War II, as global conflict persisted, George Orwell thought that nuclear weapons would lead to a world divided between super-states that would avoid “large-scale wars at the cost of prolonging indefinitely ‘a peace that will be no peace.’” Orwell shows us that ending one conflict does not automatically produce “peace.”

The reason the ideas of wartime and peacetime matter is that wartime is not simply a description of what is happening in an era, but is also an argument in support of harsh policies. Why are we detaining people without charges at Guantanamo, for example? Because it’s wartime, and it is legitimate to detain the enemy for the duration of a war.

In her book *Measuring Time, Making History,* historian Lynn Hunt notes...
that during the French Revolution, Bertrand Barère claimed that his era compelled his acts of repression. I “did not at all shape my epoch, time of revolution and political storms,” he argued. “I only did what I had to do, obey it.” The times, or the era, in this account, compelled the action, so that time modifies human agency. The idea that wartimes are exceptional moments enables this kind of determinism: the idea that one is driven or determined by the times.

Wartime as a Form of Time

If time has this kind of power in history, or at least if temporality serves to excuse or explain human behavior, then the nature and conception of wartime as a form of time demands critical attention.

In scholarship on law and war, time is seen as linear and episodic. There are two different kinds of time: wartime and peacetime. Historical progression consists of moving from one kind of time to another (from wartime to peacetime to wartime, etc.). Law is thought to vary depending on what time it is. The relationship between citizen and state, the scope of rights, the extent of government power depends on whether it is wartime or peacetime. A central metaphor is the swinging pendulum—swinging from strong protection of rights and weaker government power to weaker protection of rights and stronger government power.

This conceptualization is embedded in scholarship in law and legal history; it is written into judicial opinions, it is part of popular culture. Since 9/11 there have been important revisionist efforts, but by and large they aim for different ways to describe the era (is it a war or an emergency?) leaving the basic conceptual structure in place (normal times ruptured by non-normal times). But this understanding of time is in tension with the practice of war in American history. The problem of time clouds our understanding of law and war.

One reason that the temporal frame for war has so much power is that the outbreak of war is often experienced as ushering in a new era. After Pearl Harbor, for example, Supreme Court Justice Felix Frankfurter said to his law clerk: “Everything has changed, and I am going to war.” But the onset of war is seen not as a discrete event, but as the beginning of a particular era that has temporal boundaries on both sides. It is during such an era—a wartime—that law takes on its wartime qualities.

But is an “era” a natural phenomenon—a property of time itself, or is it what we make of time? For anthropologist Carol Greenhouse, we tend to think of “our” time as natural time, and everything else as socially constructed, but the linear time we think of as natural is also given meaning in social life. Sociologist Émile Durkheim explained that it is difficult to see the cultural nature of time. “Try to represent what the notion of time would be without the processes by which we divide it, measure it or express it with objective signs, a time which is not a succession of years, months, weeks, days and hours! This is something nearly unthinkable.” How could we “conceive of time except on condition of distinguishing its different moments.” But Durkheim asks: “what is the origin of the differentiation?” The categories come from social life. Our ideas about time, and the way it works in history, are ideas we share to make sense of our experience.

As Thomas Allen has written, time is not “a transhistorical phenomenon, an aspect of nature or product of technology existing outside of human society,” but is “an historical artifact produced by human beings acting within specific historical circumstances.”

Just as our understanding of clock time comes from social life, the idea of wartime, as it appears in American legal and political thought, is a historical artifact, a historically contingent set of meanings that derive not from the essential nature of either war or of time. We need to view wartime, like linear time, as social time.

This matters to American law and politics because law is thought to vary depending on what time one is in. It is generally assumed that law is different during wartime, and that wartime determines law’s exceptional character. For this formulation to work, war must have temporal limits: a beginning and an end. In between exceptional wartimes is peacetime—our usual time—when normal law functions.

But if we include the small wars in U.S. history, during the twentieth century there were only six years when the United States did not employ military force overseas. United States involvement in military conflict overseas is ubiquitous at least since the beginning of the twentieth century, and not confined to identifiable “wartimes.”

When Did World War II End?

Perhaps major American wars—the wars we think of as having important impacts on domestic politics and culture—wars such as World War II—have real time boundaries. We think we
know when World War II happened, for example. But in a murder case on a U.S. Army base in California, the defendant’s life depended on when World War II had ended, requiring the U.S. Supreme Court to rule on whether the war was over in 1949.

John Lee, a prisoner at the United States Army Disciplinary Barracks at Camp Cooke in California, and three others were charged with killing another inmate, Charlie Taylor. They were convicted following a court-martial and sentenced to death, but Lee’s sentence was later reduced to life in prison. The difficulty in the case was that Article 92 of the Laws of War provided that “no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.” Lee brought a habeas corpus challenge, arguing that the date of the crime, June 10, 1949, was a time of peace, depriving the court-martial of power over the case.

This case literally turned on when World War II ended. What were the possibilities? Germany surrendered on May 8, 1945. Japan announced its decision to surrender on August 14, 1945, and surrender documents were officially signed on September 2, 1945. President Harry S. Truman proclaimed the cessation of hostilities on December 31, 1946, but said that “a state of war still exists.” As late as 1951, “as a legal matter,” the nation was still in a state of war against Germany. Truman called for an end to this state of war in July 1951 but stressed that this would not affect the occupation of Germany. A declaration of peace with Japan occurred on April 28, 1952.

The various endings to World War II left the Court in something of a muddle in Lee v. Madigan. The prosecution argued that the nation was not “in time of peace” in 1949 “for the purpose of Article 92,” since that provision had not yet been repealed. Ultimately, Justice William O. Douglas argued that “Congress, in drafting laws, may decide that the Nation may be ‘at war’ for one purpose and ‘at peace’ for another.” The Court’s job was “to determine whether, ‘in the sense of this law,’ peace had arrived.” While the Court in previous cases had found the war powers to extend long beyond the dates of surrender, Madigan concerned “a grant of power to military tribunals to try people for capital offenses,” unlike cases on regulatory powers. Douglas essentially gave the Article a “common

(Continued on page 10)
Learning Gateways

Wartime or Peacetime?

Lee v. Madigan Case Study

This case study helps to illustrate how the legal distinctions between wartime and peacetime, while significant, can often be unclear. Students analyze World War II “ending” documents and then consider how each might influence the outcome of the case Lee v. Madigan. Finally, students compare all of their analyses to the Supreme Court opinion issued in the case.

What You Will Need:
- Copies of Lee v. Madigan Case Study
- Copies of World War II Ending Documents
  - Document 1: German Instrument of Surrender, May 8, 1945
  - Document 2: Japan Announces Surrender, August 14, 1945
  - Document 3: Japan Instrument of Surrender, September 2, 1945
  - Document 4: Proclamation 2714, Cessation of Hostilities of World War II, December 31, 1945
  - Document 5: Proclamation 2950, Termination of State of War with Germany, October 24, 1951
  - Document 6: Treaty of Peace with Japan, April 28, 1952 (excerpted)

All materials are available as print or share-ready downloads at www.insightsmagazine.org.

Part I: When Did World War II End?
1. Organize students into six small groups. Distribute one of the World War II Ending Documents to each group.
2. Ask each group to study their document and then discuss the following questions:
   - What is your document?
   - What was the purpose of your document? What did your document do?
   - How does your document contribute to the ending of World War II?
3. Allow each group to share their documents with the rest of the class. Compile a list of all of the documents in chronological order for the class. Explain that all of the documents are related to the ending of World War II. Ask students to discuss the following questions as a class:
   - What types of documents do you see?
   - Is there anything about this list that surprises you?
   - Which document(s) do you think are the most “official”? Why?
   - Based on these documents, when do you think World War II ended? Why?
4. Explain to students that the U.S. Supreme Court had to answer this very question—“When did World War II end?”—in 1959 in a case called Lee v. Madigan.

Part II: Lee v. Madigan
1. Distribute copies of the Lee v. Madigan case study. As a class or in groups, review the facts of the case:

   Facts of the Case
   On June 10, 1949, John Lee, a prisoner at the United States Army Disciplinary Barracks at Camp Cooke, in California, and three others, were charged with killing another inmate, Charlie Taylor. Lee had served with the U.S. Army in France during World War II, and was still an active soldier. He was court-martialed, convicted, and eventually sentenced to 20 years in prison. He challenged the verdict based on Article 92 of the Laws of War, which provided that “no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.” Lee argued that the date of the crime, June 10, 1949, was a time of peace, depriving the court-martial of power over the case.

   Ultimately, the case reached the U.S. Supreme Court in 1958. The question before the Court was essentially whether June 10, 1949, was peacetime or wartime.

2. Discuss the case with students:
   - What happened in the case of John Lee?
   - Why was the legal distinction between “wartime” and “peacetime” so important?
   - Do you think Lee’s challenge of his court-martial was appropriate? Why or why not?
   - How might the Court begin to determine whether June 10, 1949, was peacetime or wartime?
   - Based on the document(s) that you reviewed, what do you think the Court’s ruling should be? Why?

3. As a class or in groups, review the Opinion of the Court and the Dissenting Opinion:
Opinion of the Court

The Court issued its opinion on January 12, 1959, in favor of Lee. Six justices were part of the opinion, which was written by Justice William O. Douglas.

... Since June 10, 1949—the critical date involved here—preceded these latter dates, and, since no previous action by the political branches of our Government had specifically lifted Article 92 from the “state of war” category, it is argued that we were not then “in time of peace” for the purposes of Article 92. That argument gains support from a dictum in Kahn v. Anderson, that the term “in time of peace,” as used in Article 92, “signifies peace in the complete sense, officially declared.” Of like tenor are generalized statements that the termination of a “state of war” is “a political act” of the other branches of Government, not the Judiciary. ... We do not think that either of those authorities is dispositive of the present controversy. A more particularized and discriminating analysis must be made. We deal with a term that must be construed in light of the precise facts of each case and the impact of the particular statute involved. Congress, in drafting laws, may decide that the Nation may be “at war” for one purpose and “at peace” for another. It may use the same words broadly in one context, narrowly in another. The problem of judicial interpretation is to determine whether, “in the sense of this law,” peace had arrived. Only mischief can result if those terms are given one meaning regardless of the statutory context.

We deal with the term “in time of peace” in the setting of a grant of power to military tribunals to try people for capital offenses. Did Congress design a broad or a narrow grant of authority? Is the authority of a court-martial to try a soldier for a civil crime, such as murder or rape, to be generously or strictly construed?

We approach the analysis of the term “in time of peace” as used in Article 92 in the same manner. Whatever may have been the plan of a later Congress in continuing some controls long after hostilities ceased, we cannot readily assume that the earlier Congress used “in time of peace” in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction. We will not presume that Congress used the words “in time of peace” in that sense. The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by the Articles of War. We hold that June 10, 1949, was “in time of peace” as those words were used in Article 92. ...

Dissenting Opinions

Justices John Marshall Harlan II and Tom C. Clark dissented from, or disagreed with, the Court’s opinion.

... today’s decision is demonstrably wrong. This Court has consistently, for nearly 100 years, recognized in many contexts that a cessation of active hostilities does not denote the end of “war” or the beginning of “peace” as those or similar terms have been used from time to time by Congress in legislation.

... This Court, in construing a statute, recognized that “‘The state of war’ may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act.”

... The Court says that “Congress, in drafting laws, may decide that the Nation may be ‘at war’ for one purpose, and ‘at peace’ for another.” Of course it may. But the Court points to no case, and I know of none, which has construed statutory language similar to that found in Article 92 to mean anything but “peace in the complete sense, officially declared.” Under these circumstances, ... the conclusion seems to me unmistakable that Congress intended that “peace” in Article 92 means ... congressional legislation.

Today’s decision casts a cloud upon the meaning of all federal legislation the impact of which depends upon the existence of “peace” or “war.” Hitherto, legislation of this sort has been construed according to well defined principles, the Court looking to “treaty or legislation or Presidential proclamation,” to ascertain whether a “state of war” exists. The Court, in an effort to make a “more particularized and discriminating analysis,” has apparently jettisoned these principles. It is far from clear to me just what has taken their place. ...

The Court does not say when the “peace” which it finds to have existed in June, 1949, came into being. It may be noted that the Presidential Proclamation of December 31, 1946, proclaiming the cessation of hostilities, specifically announced that “a state of war still exists,” and that Senate Joint Resolution 123, 61 Stat. 449 (effective July 25, 1947), which repealed or rendered inoperative a selected group of wartime measures (not including Article 92), was obviously an expression of a conscious and deliberate decision by Congress that the time had not yet come to end the state of war. It was not until October 19, 1951, that Congress, by joint resolution, declared that “the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated,” and not until April 28, 1952, the effective date of the Japanese Peace Treaty, that peace with Japan was proclaimed by the President. ...

4. Discuss the Court’s opinion with the class:
   - What did the Court ultimately decide? What does the dissenting opinion argue?
   - Which of the documents that you reviewed were available on June 10, 1949? How might these influence the Court’s decision?
   - Do you agree or disagree with the Court’s decision?

5. Wrap up discussion by asking students to consider what governmental actions they think are necessary to distinguish between “wartime” and “peacetime.”
Discussion Questions

1. What do we mean by the terms “wartime” and “peacetime”? How do we typically understand their difference?

2. The author discusses use of a swinging pendulum as a common “central metaphor” for issues of law and national security. What does it mean? What does the author think of this metaphor?

3. In Lee v. Madigan, Justice Douglas argued that “Congress, in drafting laws, may decide that the Nation may be ‘at war’ for one purpose and ‘at peace’ for another.” Does that standard make sense to you? Why or why not?

4. Do you agree that September 11 changed everything? Why or why not?

5. The author concludes that “during ongoing war, our ‘wartime’ law is our everyday law, which we as citizens must take responsibility for.” Do you agree? What do you think she means by asserting that citizens must take responsibility? What would this involve?

Suggested Resources


The greatest challenge to the idea that war is exceptional is simply the facts on the ground. If the war on terror was a rupture of normal time, then it was inherently temporary, and would last only until normal times returned. Jeh Johnson has urged that we are now tipping into peacetime. But as conflict continues, perhaps instead we are tipping into a form of warfare that largely escapes our attention.

Most Americans are isolated from the experience of war, but this era doesn’t seem very peaceful in parts of the world where American drones hover. The ongoing deployment of force is not so exceptional, of course, for persistent smaller-scale wars have been a feature of U.S. international relations for the last century and more.

That wartime does a lot of work in our thinking about law and politics may be ironic at a time when—except when there is a crisis—we rarely think about it. Although the Obama administration has worked to maintain the “wartime” paradigm, the president has also sought to convince the American people that he is moving us to the place we want to be: peacetime. Meanwhile, a president who came into office pledging to end wars and promising transparency, champions decision making about the use of force behind closed doors, and with methods that don’t disturb the American people. The focus on secrecy—even the legal rationales for targeted killings are secret—reinforces the president’s ability to pursue military action while the American people experience what seems like a peacetime. In this way, contemporary wartime is not exceptional, but instead the passage of what has become normal time in America.

Because of this, the law and politics we have during war is not a suspension of normal rules that will someday go away. Instead, during ongoing war, our “wartime” law is our everyday law, which we as citizens must take responsibility for.
In July 2009, General Stanley McChrystal, Commander of U.S. and NATO forces in Afghanistan, issued a tactical directive governing the use of force by all U.S. and NATO forces. “[W]e will not win based on the number of Taliban we kill,” he wrote. “This is different from conventional combat, and how we operate will determine the outcome more than traditional measures, like capture of terrain or attrition of enemy forces.” General McChrystal stressed the importance of limiting civilian casualties and causing excessive damage and went so far as to curtail the use of air attacks and air support, except in cases of self-defense where no other options are available. McChrystal recognized in his directive that this policy was supported by both legal and moral considerations, but he emphasized to the troops that the policy was grounded in strategic concerns: “loss of popular support will be decisive to either side in this struggle. The Taliban cannot militarily defeat us—but we can defeat ourselves.”

McChrystal’s directive is perhaps most striking for its outright rejection of the kill-capture strategy that defines conventional warfare in favor of the win-the-population strategy that characterizes counterinsurgency. Winning the population involves much more than just killing and capturing enemy forces. It requires securing the population, providing essential services, building political and legal institutions, and fostering economic development. Though killing and capturing does take place, it is not the primary goal, and it may often be counterproductive, causing destruction that creates backlash among the population and fuels their support for the insurgency. As importantly, McChrystal’s directive recognizes that law and strategy are in alignment. Driven by the need for...
popular support, counterinsurgents should follow the dictates of law and humanity whether targeting insurgents, compensating civilians, detaining prisoners, or occupying territory. The counterinsurgent’s conduct should always be designed to win over the population—and that means following the law.

In recent years, however, many have argued that the United States and its allies in counterinsurgency and counterterrorism operations can ignore the laws of war. They argue that the laws of war are based on the concept of reciprocity between states, and because terrorists and insurgents do not comply with the law, the United States need not do so either. As Ruth Wedgwood has said, “[t]o claim the protection of the law, a side must generally conduct its own military operations in accordance with the laws of war.” Others have argued that the United States has no duty to follow the laws of war because reciprocity is absent. Former Bush administration official John Yoo is probably the most prominent advocate for this view. “The primary enforcer of the laws of war has been reciprocal treatment: We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with al Qaeda.”

The principle of reciprocity, one of the foundational ideas in the laws of war, is defined as “the relationship between two or more States according each other identical or equivalent treatment.”

Reciprocity enables cooperation between states in the context of a world system in which states are unwilling to act unilaterally. By cooperating along equivalent terms, states constrain their actions and the actions of other states without losing any advantage. Reciprocity also has the benefit of making international law enforceable. Given that there is no global sovereign to punish those who violate international law, reciprocity makes international law self-enforcing.

For example, consider a situation in which two countries make an agreement not to use exploding bullets in a conventional war. They both are better off if they cooperate than if they both defect because their soldiers will not go through the suffering that accompanies exploding bullets. But if one side follows the ban and the other side uses the exploding bullets, the defector benefits because it will likely kill or injure soldiers faster. Violating the ban on exploding bullets therefore seems rational. However, if the two countries know that they might face each other in battle multiple times, following the ban on exploding bullets then becomes rational for both sides. A country could violate the ban in the short term, gaining high benefits, but its soldiers would face horribly destructive costs as the other country decides it too must violate the ban. Both sides would be worse off. Instead, if both countries follow the ban, each benefits in the short and long term. Thus, the potential for future defection by the enemy provides a check on a country’s actions. Through this mechanism, the principle of reciprocity provides international affairs with a way to enable cooperative action when violating the law may be beneficial in the short run.

The challenge arises with terrorists and insurgents. Terrorists and insurgents are perennial defectors, which makes the enforcement element of reciprocity meaningless and leads Wedgwood, Yoo, and others to question the relevance of reciprocity—and the laws of war. In response to these criticisms, commentators have pursued two tracks. One response is that the laws of war are not really based on reciprocity but rather on humanitarian principles. The humanitarian approach concedes that there is no self-interested argument for following the laws of war in asymmetric situations. In cases when reciprocity fails, the needs of humanity are a backstop justification for compliance with the law. The other response is that reciprocity may still provide a justification for adherence to the laws of war despite the asymmetry of compliance between state and nonstate actors. As a matter of “specific” reciprocity, it is unlikely terrorists will comply with the laws of war; however, if the United States violates the laws of war, terrorists might act even more ruthlessly than they would have otherwise. The “diffuse” reciprocity argument warns that violating the laws of war will undermine humanitarian norms generally, which may be harmful in the long run. And the “indirect” reciprocity argument cautions that U.S. personnel and POWs might be treated poorly in future conflicts given the actions of the United States in this conflict. Thus, some argue that reciprocity still works and the United States should continue to follow the laws of war.

The trouble with these approaches is that they fail to account for the
strategic self-interest at work in counterinsurgency. Reciprocity in the laws of war is based on two premises that are inapplicable in counterinsurgency. First, the opponents are each better off using violence to destroy the enemy, but each side can reduce its costs if both limit certain tactics. Second, if one side defects, the other side is at a disadvantage. Counterinsurgency’s win-the-population strategy rejects these propositions. The counterinsurgent is not better off using destructive violence to kill and capture the enemy; rather, the counterinsurgent must win the population by securing the population, ensuring essential services, establishing governance structures, developing the economy and infrastructure, and communicating with the population. These operations require limitations on destructive violence. The reason for the counterinsurgent to limit its actions is not out of reciprocity with the enemy to reduce mutual costs, but out of pure unilateral advantage. What is important is that the win-the-population strategy does not turn on the operations of the insurgent enemy: whether the insurgent is ruthless and vicious or lawful and humanitarian is irrelevant to the counterinsurgent’s strategy.

As importantly, the fact of asymmetry—of the insurgency’s defection from the laws of war—is therefore irrelevant to the counterinsurgent’s strategy. It may even be helpful to the counterinsurgent’s operations. Because the goal is to win over the population, a counterinsurgent that follows the laws of war may be at an even greater advantage in the context of an insurgency that is ruthless and vicious than in the context of a lawful and humane insurgency. A ruthless insurgent will alienate the
population, creating fear and terror. A humane and lawful counterinsurgent, in contrast, gains legitimacy and the support of a population that seeks a stable, orderly society, free of violence and fear. The counterinsurgent seeks legitimacy, which is assisted by its adherence to law and humanity and by the insurgent’s disregard for law and humanity. In essence, asymmetry does not undermine an interest-based justification for adherence to law, but rather supports and deepens it. Instead of self-interest based on cooperative reciprocity, self-interest is driven by unilateral advantage. As a result, the counterinsurgency approach rejects the basic tension between humanity and military efficacy and replaces it with the idea that humanity is needed for military success.

**The Principle of Exemplarism**

Counterinsurgency therefore suggests the principle of exemplarism as a foundation for the complying with the laws of war. Exemplarism is an inherently asymmetric approach. It holds that a party can be bound to law regardless of the actions of other parties. In doing so, the exemplarist state gains in prestige, legitimacy, and power. Unlike “indirect” reciprocity, exemplarism does not premise adherence to law on the future threat of direct equivalent retaliation by a third party. And unlike “diffuse” reciprocity, it does not premise adherence to law based on the future threat of equivalent retaliation by the reduction of a community norm. Importantly, exemplarism is also not based on moral or professional ideals of martial virtue or national self-respect. Instead, exemplarism is based on the strategic self-interest of the party. In essence, exemplary conduct leads to victory.

This self-interested justification for rules in armed conflict provides a nonhumanitarian and nonreciprocity justification for following those rules. Military manuals and codes of conduct were some of the earliest restraints on combat and had no reciprocal element. Manuals provided greater internal discipline and war readiness and would sometimes limit damage caused “to facilitate the return to normality after the end of hostilities.” The impetus and success of these measures was tied to their strategic advantage, not humanity or reciprocity. Over time, it is worth noting, some of the principles established in manuals have even become customary law, such as the requirement that superior officers authorize any reprisals. Exemplarism also provides a new justification for certain norms, to date justified under humanitarian aims. For example, Article 54 of Additional Protocol I to the Geneva Conventions bans destroying objects needed by the population, even if destruction would also harm the enemy. The traditional justification is humanitarian, not reciprocal. An exemplarist approach provides a self-interested justification for these rules: harming the population fuels insurgency and spreads the conflict.

Instituting the exemplarist principle into law ensures that the feedback effects it relies upon will apply to both well- and ill-intentioned counterinsurgents. Some states may seek to characterize freedom fighters, political opponents, or disgruntled members of the population as insurgents in order to quash them. Indeed, many nations have used the Bush administration’s war on terror theories to clamp down on domestic opposition. Moreover, we cannot assume that all insurgencies need to be overcome. Some may rightfully seek political freedom or independence. Under exemplarism, ill-intentioned counterinsurgents will act in accordance with strategic necessity and law, thus retaining their efficacy and adding legitimacy to their operations. At the same time, ill-intentioned counterinsurgents—the dictator seeking to crush domestic political opposition by calling it an insurgency or terrorist group—will be seen as violating the law. The law therefore serves as a baseline for evaluating conduct and as a tool of warfare itself. Legal violations will fuel grievances, spur on insurgency, and undermine international support; legal compliance will help win the population, build international support, and undermine insurgent propaganda. This enforcement mechanism is not based on the reciprocal threat of retaliation. Rather, the exemplarist model creates a standard of conduct based on the strategic foundation of win-the-population. Because victory is tied to the counterinsurgent’s behavior, rather than its relation to the enemy, a legal structure that sets a standard for that behavior—even as it enables operations—is internally enforcing. Legitimacy and success build on themselves more than on the destruction of the opponent. Hence the ill-intentioned counterinsurgent will confront a downward legitimacy
## Conventional and Counterinsurgency Operations Contrasted

<table>
<thead>
<tr>
<th></th>
<th>Conventional Operations</th>
<th>Counterinsurgency Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mission</strong></td>
<td>• Support combat unit missions</td>
<td>• Same as conventional operations plus support of logistical lines of operations specific to counterinsurgency</td>
</tr>
<tr>
<td></td>
<td>• Sustain and build combat power</td>
<td>• Support both a static and a mobile force</td>
</tr>
<tr>
<td></td>
<td>• Support a mobile force with clear organization and structure</td>
<td>• Increased requirements for area support operations</td>
</tr>
<tr>
<td></td>
<td>• Typically in direct support</td>
<td>• Logistic units and assets can be assigned as decisive and shaping operations (focused on the environment)</td>
</tr>
<tr>
<td></td>
<td>• Logistic units and assets conduct only sustaining operations (focused on the force)</td>
<td></td>
</tr>
<tr>
<td><strong>Enemy</strong></td>
<td>• Enemy forces have supply trains and support echelons</td>
<td>• Insurgents use nonstandard, covert, supply methods that are difficult to template</td>
</tr>
<tr>
<td></td>
<td>• Friendly operational surprise (masking possible)</td>
<td>• Limited operational surprise</td>
</tr>
<tr>
<td></td>
<td>• Difficult for enemy to perform pattern analysis</td>
<td>• Easy for enemy to observe patterns in friendly logistic operations</td>
</tr>
<tr>
<td></td>
<td>• Targeting logistical units is the enemy’s shaping effort and considered a second front</td>
<td>• Insurgents place a high value on attacking logistic units and other less formidable, soft, high-payoff targets</td>
</tr>
<tr>
<td><strong>Terrain</strong></td>
<td>• Fought in definable area of operations</td>
<td>• Operational environment poorly defined with multiple dimensions</td>
</tr>
<tr>
<td></td>
<td>• Focus on destruction of enemy combat forces</td>
<td>• Support of the host nation population is the key objective</td>
</tr>
<tr>
<td></td>
<td>• Few constraints</td>
<td>• Constrained time to achieve results, yet many counterinsurgency tasks are inherently time consuming</td>
</tr>
<tr>
<td></td>
<td>• Echeloned formations and discernible, hierarchical logistic organizations supporting well-defined contiguous areas of operations</td>
<td>• Noncontiguous areas of operations and wide dispersion of units</td>
</tr>
<tr>
<td></td>
<td>• Relatively secure lines of communications facilitate distribution operations from theater to corps to division to brigade</td>
<td>• No front; everything is potentially close, yet far</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Need to maximize multiple lines of communications capacity/greater complexity</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Potentially decreased throughout capabilities</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Increased area support requirements</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Lines of communications vulnerable</td>
</tr>
<tr>
<td><strong>Troops and Support Available</strong></td>
<td>• Uniformed personnel always suitable</td>
<td>• Uniformed personnel usually suitable</td>
</tr>
<tr>
<td></td>
<td>• Contractor personnel suitable for secure areas only</td>
<td>• Suitability of contract personnel judged case by case</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Task and location dependent; must be part of economic pluralism promotion plan</td>
</tr>
<tr>
<td><strong>Time Available</strong></td>
<td>• Tempo quicker</td>
<td>• Long duration operations</td>
</tr>
<tr>
<td></td>
<td>• Geared toward decisive major combat</td>
<td>• Continuity logistics/hand-off planning often required</td>
</tr>
<tr>
<td><strong>Civil Considerations</strong></td>
<td>• Secondary to considerations of how to defeat the enemy</td>
<td>• May be the primary determinant of victory</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• May figure prominently in logistic planning</td>
</tr>
</tbody>
</table>

Learning Gateways

What Is “Counterinsurgency”?*

“Counterinsurgency” is a word that appears often in the media but is often undefined. This lesson will ask students to think through counterinsurgency measures as a means to defining the term. It incorporates primary sources such as a news photo and a U.S. Army counterinsurgency execution chart.

What You Will Need:
Copies of Photo
Copies of “Executing Counterinsurgency Operations” Chart

All materials are available as print or share-ready downloads at www.insightsmagazine.org.

1. Distribute copies of the photo to students. In small groups, or as a class, have students discuss what they see:
   - What do you think happened in the photo?
   - Who are the people in the photo?
   - What condition is the community in?
   - How might this affect the people in the picture?

2. Ask students what they think needs to happen for the village to begin to rebuild, and eventually recover. Compile a list of ideas.

3. Explain that this photo is from a village in Syria, 2012. The village was attacked by insurgents as part of an ongoing conflict in the country. Ask if students have heard the term, and what they know about, “counterinsurgency.” How is it related to “insurgency”?

4. Share with students the U.S. Department of State’s official definitions of “counterinsurgency” and “insurgency”:
   - **Counterinsurgency (COIN)** is the blend of comprehensive civilian and military efforts designed to simultaneously contain insurgency and address its root causes.
   - **Insurgency** is the organized use of subversion and violence to seize, nullify, or challenge political control of a region.

5. Distribute the chart and explain that this is an actual plan from the U.S. Army handbook on “Counterinsurgency” that suggests the best procedure for rebuilding a village like the one in the photo. One abbreviation on the chart may be confusing: HN=Host Nation.

6. Compare some of the items on the chart with students’ ideas from earlier. Then explore some of the items on the chart:
   - How might the ideas on the chart help to reestablish a village or a country?
   - What resources do you think are required to execute some of the ideas on the chart?
   - Are any of the things in the chart more significant than others?
   - What areas of the chart deal with law? What role does law play in this plan?
   - How does law help to rebuild or stabilize the situation in the photo?

7. Wrap up with discussion of definition of “counterinsurgency” and what is involved in executing a counterinsurgency strategy.

*Photo and chart courtesy of Wikimedia Commons.
spiral, with exemplarist laws working against it, and the well-intentioned counterinsurgent will see an upward legitimacy spiral, with the law assisting its operations.

One example of how the exemplarist principle would manifest is in removing any thresholds for applying humanitarian norms that are conditioned on the nonstate opponent. As one commentator has noted, the applicability of laws in international armed conflict is currently “conditioned on reciprocity of obligations.” This is not true of internal armed conflict, since Common Article 3 of the Geneva Conventions (which governs internal armed conflict) does not have a reciprocity-based threshold for it to apply. But Additional Protocol II to the Geneva Conventions, which is intended to apply in conflicts with “dissident armed forces,” reintroduced the reciprocity-based threshold. It requires that the insurgent forces are “under responsible command, exercise such control over a part of [the country’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Through the requirements of territory and command, the Protocol attempts to ensure equality of the two sides in the conflict as a foundation for reciprocity: both sides must implement the Protocol. An exemplarist would reject this condition as driven by the wrong strategic model. Because counterinsurgency does not rely on reciprocity but unilateral self-interest, it is unnecessary to have threshold requirements of rough equality between the insurgents and the state or for the insurgents to follow the humanitarian norms themselves. An exemplarist approach would apply the relevant provisions to the counterinsurgent state regardless of the insurgent’s conduct or degree of organization and territorial control.

One objection to this position is that reducing the requirements would legitimize and grant rights to terrorists, resulting in a perverse incentive that would encourage terrorism. However, changing one set of rules does not require changing all of the rules. It is possible to decouple the legal obligations of counterinsurgents from the tactics used by insurgents. The law could obligate counterinsurgents to comply, even as it simultaneously rejects providing protections or legitimacy to insurgent tactics such as targeting civilians. It does not follow, for example, that insurgents who place tanks in mosques to protect themselves from attack should get legal protections; rather, that practice can be justly condemned even as law binds the counterinsurgent’s forces.

Unlike conventional war, which relies on reciprocity to push states toward compliance with the laws of war, counterinsurgency’s win-the-population strategy furnishes a strategic, self-interested justification for following the laws of war. While humanitarian justifications always remain a powerful reason for counterinsurgents to follow the laws of war, the principle of exemplarism is a response to the war on terror theorists who assert that states have no self-interested reason to follow the laws of war in asymmetrical conflicts. As General McChrystal said in his tactical directive, “we can defeat ourselves.” To succeed, counterinsurgents must recognize that law, humanity, and strategy are not in conflict—they are aligned.

Understanding Peace Treaties

In today's global news media, passing references to peace treaties are quite common. It is useful, however, to understand more about these agreements, their significance, the processes that lead to their development, and the distinctive qualities of these legal primary source documents.

Defining Peace Treaties
What is a peace treaty? It is a legal agreement between two or more hostile parties, usually countries or governments, which formally ends a state of war between the two parties. Peace treaties are different from other international documents that control conflicts in that they are often the culmination of international peace discussions, and seek permanent resolutions by establishing conditions for peace. A peace treaty is not the same as a surrender, in which one party agrees to give up arms; or a cease fire, in which parties agree to suspend hostilities temporarily; or an armistice agreement, in which parties agree to stop hostilities but do not agree to long-term conditions for peace. Any, or all, of these documents, however, may precede the execution of a peace treaty between two parties. Conflicts might first end with the surrender of one party, or a compromised cease fire agreement. These might be followed by an armistice agreement, as in the case of the Korean War in 1953. In such circumstances, permanent conditions for conflict resolution may be finally enunciated in a formal peace treaty.

Peace treaties may also be distinguished from peace agreements. Peace treaties generally involve separate sovereign nation-states. In recent years, however, the international community has been compelled to reconsider how peace treaties might be used to resolve not only conflicts between nations, but conflicts within nations. Peace agreements, which serve similar legal functions as a peace treaty, are often negotiated between warring parties within one nation.

A peace treaty between the Hittites and Egyptians, following the Battle of Kadesh in 1274 B.C., is commonly regarded as the first recorded. A copy of this treaty is displayed at the United Nations Headquarters. Many nations formally resolve conflicts through peace treaties, with each treaty customized to the conflict and relevant parties. Peace treaties have common goals, provisions, and formats. This allows us to analyze them as a type of legal document.

Common Issues, Similar Components
Peace treaties, while varied, generally have one broad common goal: to outline conditions for permanent resolution of hostilities between two warring parties. To this end, peace treaty provisions tend to address common issues. These include the formal designation of borders, access to and allocation of natural and manmade resources, settlement of relevant debts, recognition of refugees, processes for solving future disputes, and identification of relevant behaviors for abiding by the treaty’s provisions.

In addition to similar provisions, peace treaties exhibit similar formats. They often begin with an introduction, or preamble, which states the purpose of the peace treaty. These introductions often forgo restating any, often debated, facts about the conflict, but simply declare that peace will commence. The Treaty of Paris, which ended the American Revolutionary War with Great Britain in 1783, for example, begins with a preface that declares intentions of both parties to “forget all past misunderstandings and differences,” and “secure both perpetual peace and harmony.” The Israel-Jordan Treaty of Peace, signed in 1994, includes a preamble, which declares the “termination of the state of belligerency” between the two nations. World War I’s Treaty of Versailles, signed in 1919, forgoes an extended formal introduction in favor of a descriptive title, followed by immediate articles establishing the League of Nations.

Following the beginning of the peace treaty are provisions—the heart of the peace agreement. Because provisions may be numerous and deal with many issues, they are often organized within the treaty, similar to other long documents. Many treaties are broken into parts, sections, chapters, and finally, articles. The Treaty of Versailles, for example, has fifteen parts. Part I establishes the League of Nations while Part II outlines formal borders of Germany and Part XI details conditions for aerial navigation. Each part is then broken down into sections, each section into chapters, and each chapter into articles. So, for example, Part X, Economic Clauses, includes Section I, Commercial Relations, which includes Chapter 1, Customs Regulations, Duties, and Restrictions, which includes Article 264, which explicitly prohibited Germany from putting certain restrictions on imported goods.
A less complex treaty, however, such as the 1905 Treaty of Portsmouth, which ended the Russo-Japanese War, for example, has no parts, chapters, or sections, but rather just fifteen articles. Similarly, the Israel-Jordan Treaty of Peace includes 30 articles.

Signatories
All peace treaties have signatories, or parties who agree to sign, or abide by, the document, including the parties involved with the conflict. Becoming a signatory to a treaty may take many forms, and is often followed by a full ratification process, which enacts the treaty as law. In the case of the United States, the U.S. Constitution outlines a strict treaty ratification process. Only the U.S. president may sign treaties, but the U.S. Senate must also agree to ratify the treaty before the United States may be declared a party to the treaty. As a result, the United States is a signatory to many treaties that have not yet been ratified.

Just as one peace treaty may have multiple signatories, one complex conflict may have multiple peace treaties as part of a resolution. Following World War II, for example, aside from being party to several armistice agreements with other nations, the United States was one signatory on no less than three separate peace treaties, including the Paris Peace Treaties, which established peace with Italy, Romania, Hungary, Bulgaria, and Finland in 1947; the Treaty of San Francisco, which ended war with Japan in 1952; and the Treaty on the Final Settlement with Respect to Germany, in 1990.

Role of the International Community
The international community plays a significant role in peace treaty negotiations, signing, ratification, and enforcement. The United Nations not only provides an international forum for nations to successfully negotiate peace treaties but also oversees bodies of international law, which help to outline treaty-making processes and acceptable conditions for long-term peace. Many international conventions, or bodies of law that nations agree to follow, govern the treaty-making process. The Vienna Convention on the Law of Treaties, for example, governs the international treaty-making process. It mandates, for example, that peace treaties be written, include signatories, and maintain the same meanings in all relevant translations.

When a nation violates terms of a peace treaty, the international community is quick to provide assistance with third-party mediators or meeting space. In 2012, for example, Israel accused Egypt of violating the terms of their 1979 Sinai Peace Accords. A third-party mediator from the United States met with leaders of the nations to discuss the dispute. If violations continue, members of the international community are also poised to issue sanctions against a violating party in hopes of deterring future violations, or provide assistance to other nations as needed.

Peace treaties continue to play an important role in today's international affairs. They continue to be an end goal for many nations, even in today's modern era of seemingly indeterminate war. As legal documents, they seem to offer clear voices in an otherwise complex landscape.

Locating and Learning More About Peace Treaties

- U.S. Department of State
  The U.S. Department of State’s Office of the Assistant Legal Advisor for Treaty Affairs serves as a clearinghouse for all United States treaty activities. A searchable database provides access to all past and present treaties as well as all treaty actions. http://www.state.gov/s/l/treaty/

- Transitional Justice Institute
  Sponsored by the University of Ulster in the United Kingdom, this organization catalogs hundreds of peace agreements, especially those emerging from civil wars. There are also publications about peace agreement trends. http://www-transitionaljustice.ulster.ac.uk/index.html

- United Nations Treaty Collection
  Every treaty involving members of the United Nations is cataloged here. There are also free publications, as well as links to educational events. http://treaties.un.org/
Modern warfare is grinding and bloody, and it wanders far from the formal field of battle. Combatants in a modern war often find themselves fighting in city streets or in sprawling deserts or jungles. They may face the enemy at any time of the day or night. Modern wars are wars of general devastation, bringing violence to whole countries or even, in the case of World War II, to whole continents. Iraq and Afghanistan are only the most recent such wars.

In past centuries warfare was different. This was especially true in the age of classic warfare from 1700 to 1870. That was an age when wars were resolved through pitched battle. Armies met on a contained battlefield, where they fought out their conflict according to well-understood rules. A classic battle began at dawn, and it ended by dusk, when one side emerged as the victor. Victory in battle was translated into lasting international settlements by diplomats. Death in classic warfare did not come in the eruption of sudden, unpredictable firefights or unexpected highway explosions. Death came on the formal battlefield, where trained, uniformed armies met in open confrontation.

How did classic warfare work, and how did we lose the capacity to resolve international conflict through classic battle wars? Why are modern wars so much more uncontrolled, sprawling, and awful than the wars of the eighteenth century or early nineteenth century?

To understand, we must reflect on the institution of pitched battle. That institution is a paradoxical one. The paradox is this: A pitched battle is an awful event, a scene of horrific mass slaughter. Yet at the same time it is by its nature a contained and limited form of warfare.

Awful it certainly is. Classic pitched battles were nightmarish events for the soldiers who fought them. We have all read descriptions of the horror of the battles of the Civil War and seen the deeply disturbing photographs of Matthew Brady. The horror of battle was perhaps best captured by Henri Dunant, who founded the International Red Cross after he had witnessed the terrifying scene at the Battle of Solferino in 1859: “The poor wounded men,” Dunant wrote, “were ghastly pale. … They begged to be put out of their misery, and writhed with faces distorted in the grip of the death-struggle. …” To any humane observer, a battle seems like an unbearably event, an utter surrender to barbarism.

Yet at the same time a pitched battle is an almost miraculously contained way of settling an international dispute. If a conflict can be decided by a day of concentrated killing on the battlefield, then violence can be prevented from spilling over to the rest of society. In fact, for many centuries, staging a battle was deemed to be a perfectly acceptable, and highly desirable, legal procedure. In the Middle Ages, pitched battles were regarded as “judgments of God,” lawful ways of calling upon the Almighty to decide an international dispute. In the eighteenth century, they were regarded as settlement procedures, fought under what lawyers called a “tacit contract of chance.” Eighteenth-century battles were a kind of lawful wager, by which the warring sovereigns agreed to allow their conflict to be settled by the “chance of arms.”
Such was the core idea of classic warfare: International conflict was to be settled through pitched battle. Pitched battle was a kind of formal trial, a staged mass trial by combat, and it produced a verdict. The victorious side was entitled to claim the fruits of victory, and the vanquished were expected to cease fighting. Strange though it may sound, this system of mass trial by combat represented a kind of rule of law. Resolving disputes through the verdict of battle spared the rest of society the kind of horrific general devastation that has become the norm in modern times.

That form of classic warfare is lost today. Since the 1860s, it has become clear that we no longer have any hope of confining warfare to the formal battlefield. The two wars that marked the unmistakable turning point were the American Civil War and the Franco-Prussian War. In those great mid-nineteenth-century conflicts, even pitched battles that wore all the trappings of decisiveness, failed to decide the issue, and the conflict spread far from the field of battle. Gettysburg, to take the most familiar example, did not settle the American Civil War any more than the other famous battles of the conflict did. The war could not be limited to battle at all, as matters degenerated into guerrilla warfare and eventually into Sherman’s March to the Sea. The conflict could be ended only by an uncontrollable war of general devastation.

The Battle of Sedan, the Franco-Prussian battle fought on the momentous day of September 1, 1870, is perhaps an even more striking example. Sedan was a classic day-long pitched battle, which produced the facially decisive defeat of Napoleon III. Newspaper reports described it as one of the most clearly decisive defeats in all of human history. Eighty thousand French soldiers were taken prisoner, and the French emperor ceremoniously offered his sword to the king of Prussia and entered into a formal capitulation, an act that technically ended the war according to the international law of the day.

Yet the French populace did not accept the seemingly decisive verdict of Sedan. The Franco-Prussian War dragged on over months of horror, as the cities of France were reduced in bloody sieges one by one, while the French population mounted a bitter guerrilla campaign against the Germans, just as the Confederates of the American South had done a few years earlier. The war ended only when Moltke, the Prussian general, had finally marched all the way to the sea, as it were, just as Sherman had done five years earlier. Again a war of general devastation, spilling far off the battlefield, was necessary to secure victory.

As these examples suggest, in the 1860s and 1870s the possibility of containing war within the limits of the battlefield definitively vanished; and that moment marked the real beginning of modern warfare. To be sure, the idea of battle remained gripping enough that twentieth-century wars were still described as fought in battles. But the battles of World War I and World War II had little in common with the classic, single-day ritualized contests of earlier periods, holding out the possibility of decisive verdicts. Instead they were multiweek or multimonth monstrosities like the “Battle” of Stalingrad and the “Battle” of Verdun—sinks of horror that did nothing to restrain the eruption of...
Learning Gateways

Applying the Rules of International Humanitarian Law

Students learn about the concept of international humanitarian law, analyze photos, and then use the chart of “Basic Rules of International Humanitarian Law” to discuss how the rules might apply to the people in each photo.

What You Will Need:
Copies of Chart: “Basic Rules of International Humanitarian Law”
Copies of all six International Humanitarian Law Photographs
The chart and photographs are available for free download as print-ready handouts at www.insightsmagazine.org.

1. If students are not already familiar, explain the concept of international humanitarian law:

   International humanitarian law is a set of rules that seeks to limit the effects of armed conflict for humans involved in, or close to, the conflict. The rules regulate the conduct of persons involved with armed conflict.

2. Discuss with students:
   • Why do you think such rules should be in place?
   • What types of rules do you think might be appropriate for international humanitarian law?

3. Share with students the chart: “Basic Rules of International Humanitarian Law,” and discuss the rules that are listed.
   • How do they compare with the rules you just brainstormed?
   • Are there any rules here that surprise you?
   • Are there rules missing that you think should be in place?

4. Explain to students that they will now look at some photographs of real-life situations and then brainstorm which rules of international humanitarian law might apply. Distribute photos to students in groups, or individually. The photos have been selected to provide a glimpse into situations that are all relevant to international humanitarian law, including:
   • Soldiers interacting with civilians
   • Refugees, or persons displaced because of conflict
   • Hospitals
   • Prisoner(s) of War

5. As students look at each of the photos, they should address the following questions:
   • What is happening in the photograph?
   • Who are the people in the photograph? What are their roles in the situation shown?
   • What rules from international humanitarian law might apply to the people in the photograph? Do you think these rules are adequate? Why or why not?

6. If students are working in groups, allow them to share their photograph and ideas with the rest of the class. Discuss the photographs and the rules with the class:
   • Did you notice similarities or differences among the photos? If so, what?
   • Why do you think it is necessary to have international humanitarian laws that address these issues?
violence into society at large, events in uncontrollable wars that ended only in the utter destruction of one side. More recently the “Battle” of Baghdad in 2003 certainly resulted in the utter defeat of Iraqi forces. In the classic language of Carl von Clausewitz, it was a successful “battle of annihilation,” which means that, according to Clausewitzian theory, it should have succeeded in deciding the issue. But the “Battle” of Baghdad did not bring a settled peace to Iraq, as, once again, the war spilled far off anything that could be called a battlefield.

That history suggests the questions that we must answer if we are to wrestle with the predicament of modern war. How did our ancestors succeed in limiting warfare to the concentrated collective violence of pitched battle? Why did the classic pitched battle go into decline in the age of the American Civil War and the Franco-Prussian War? Is there anything we can still learn from the battle warfare of the past?

It takes a book to answer those questions in full, of course. But here are some answers involving the history of law.

Classic battle warfare rested on a distinctive conception of the law of war—a conception that is utterly foreign to modern lawyers. The modern law of war is essentially humanitarian in nature: Modern lawyers think of war as a horrific evil, a plague on mankind; and they imagine that it is the task of the law of war to curb the evil as much as possible. To that end, modern lawyers have devoted themselves to creating two varieties of the law of war: a jus ad bellum, a law of the right to go to war, which is intended to restrict war-making to cases of the most desperate necessity; and a jus in bello, an International Humanitarian Law intended to keep the practice of warfare within the strictest bounds of respect for human life. Modern lawyers are now also attempting to develop a jus post bellum, a law intended to impose strict humanitarian limits on the actions of victorious powers. If wars must be fought, modern lawyers believe, they should only be fought in the name of noblest causes, and within limits showing the most unwavering concern for sparing human lives.

The classic law of war was different. It certainly included some humanitarian rules. But the law that principally governed classic battle warfare was something else: It was jus victoriae, law of victory. The jus victoriae rested on the assumption that war was not a last resort to be used in self-defense and comparably dire circumstances,
Questions
1. How are “classic” and “modern” warfare different? Similar? Why do you think this is?
2. What and when was the Kellogg-Briand Pact? Why is it significant?
3. Do you agree with the author that “wars fought for noble causes are inherently difficult to end?”

Discussion
The classic jus victoriae was law that governed this controlled process of making war in order to acquire property. It aimed to answer two technical legal questions, often quite difficult to resolve. Those questions were questions about procedure and about the acquisition of property rights. First, how do we know who won? and second, what do you win by winning?—or, to put it a bit differently, what rights can the victor claim by virtue of victory? The classic jus victoriae established relatively clear rules in response to those questions. In battle, the victor was the side that held its ground, while the vanquished was the side that retreated. Formal victory gave troops an enforceable claim to their booty, while their sovereigns became the new dynastic lords of territories in dispute.

The jus victoriae is thoroughly dead today. We no longer accept the proposition that a war can count as a kind of legal procedure; and we viscerally reject the idea that wars should be fought in order to lay claim to property. We owe our modern vision of international law to the philosopher Immanuel Kant, who denounced the classic conception of warfare in 1795. Reason, Kant proclaimed, flatly condemned the idea that a war could be used as a lawful dispute-resolution procedure. How could it ever be right to stage a mass killing in order to settle crass territorial disputes? Instead of using wars to settle international disputes, Kant called for a new international order in which peaceful, republican forms of government would establish themselves everywhere, and in which disputes would be settled by a congress of nations. Kant’s vision has stirred lawyers ever since. It found expression in the Kellogg-Briand Pact of 1928, which outlawed the use of war as a procedure for the resolution of international conflict; and it stimulated the creation first of the League of Nations and then of the United Nations.

Yet when we abandoned the classic law of war we lost touch with the classic means of limiting warfare. It seems barbaric to us to use a war as a legal procedure. But the very fact that a battle was regarded as a procedure permitted it to be fought in an orderly procedural way.

Even the proposition that wars could be fought for material gain helped serve the end of limiting warfare. It seems manifest to us that wars should only be fought for noble causes. What else could possibly justify the killing? Yet wars fought for noble causes are inherently difficult to end. When we fight for noble causes, our demands are inevitably nonnegotiable. Indeed all of modern humanitarian international law consists of nonnegotiable principles. We have committed ourselves to establishing norms of civilization to which all sovereigns must submit unconditionally.

But it is in the nature of nonnegotiable demands that they give rise to wars that cannot easily be ended through negotiation. The classic law of war lent itself to diplomatic resolution. Because all the parties were fighting for material ends, all the parties could eventually be brought around the table to bargain. Wars could be ended diplomatically. Indeed the diplomats of the classic era often enjoyed stunning success in crafting lasting international settlements.

By contrast, the rise of modern international law, with its admirable humanitarian drive, has brought with it a grave danger. When wars are fought in the name of high humanitarian ideals, it is nearly impossible to end them through negotiation. Modern humanitarian lawyers understandably refuse to cut deals with evil states or evil actors. That means that they leave less and less wiggle room for diplomats, whose very business is cutting deals. The inevitable consequence is that wars are harder and harder to end.

That is the consequence we have been living with in Iraq and Afghanistan. The wars in both of those devastated countries have been frustrating and inconclusive. By insisting on fighting only for the highest ideals, we have left ourselves no easy or natural way to make peace. And while that means that we have the satisfaction of fighting for noble causes, it also means that we have no easy or natural way to limit the suffering of war.
Is There Still a Legal Distinction Between War and Peace?

Practical Distinctions Are Relevant

By Linda Bishai

There is still a legal distinction between war and peace, but its parameters have become so blurred that it is becoming less relevant than a question about the practical distinction between the conditions of war and the conditions of peace felt by much of the world’s population.

The distinction focuses more on the role of formal militaries and recognized belligerents and whether they are operating under the laws of war than on whether a formal declaration of a state of war has occurred. That is, what matters for the legal distinction between war and peace is whether soldiers are legally able to kill and legally bound by the limitations on killing found in the body of customary and treaty-based international law. The distinction has blurred because of the changing nature of conflict since the middle of the twentieth century.

With the dramatic increase in the number of civil wars, insurrections, and nonstate transborder conflicts, it has become less and less likely that two national armies will be directly engaged in the type of combat easily categorized as war. Nonstate actors (from nationalist or ethnic movements to religious radicals or transnational criminal networks) are now able to use force from within and against civilian populations to achieve their aims of dismantling, destabilizing, or manipulating the state.

These so-called “new wars” make it very difficult for national armies to properly apply the laws of war, and local law enforcement and policing become intertwined with military solutions. There are few signs that this pattern will resolve any time soon, and so it becomes increasingly difficult for states to respond to violent threats with sharp clarity between internal (policing) and external (military) functions. This has had profound implications for national populations.

The more relevant observation is that there is no more practical distinction between the conditions of war and the conditions of peace. For those experiencing conflict it will not matter that the national government insists that a state of war does not exist. The practical effects on the lives of civilian populations in these “new wars” is often profound insecurity and a weakening of the protective institutions that contribute to the rule of law. For these populations, it matters less whether their country is at war than whether they can feel protected from the many sources of violence around them.

Linda Bishai is a senior program officer in the Academy for International Conflict Management and Peacebuilding at the United States Institute of Peace. She focuses on peacebuilding education and conflict management programming in Sudan, Pakistan, Iraq, and Afghanistan.

Want to learn more? Visit us at www.insightsmagazine.org.
We are at a crossroads: traditional state war has morphed, by force of circumstances, into conflict between states and non-state actors. Traditionally, international law sought to establish criteria and limits by which nation states fought wars against other states, although violations of the laws of war inevitably occurred. Nevertheless, the rules were clearly articulated and understood. The era of state versus nonstate conflict, in contrast, has been marked by both random and deliberate attacks against innocent civilians by nonstate actors.

The state, in response, has been forced to develop and implement operational counterterrorism measures intended to protect the civilian population while striking at those responsible for the attacks. These responses include controversial tactics such as the use of unmanned aerial vehicles—drones—and targeted killings. Such response has been legitimate and necessary. The primary obligation of the state is to protect its innocent civilian population and valuable national resources and assets. While this obligation is unambiguous, questions remain: How can a state meet these obligations? Should there be limits imposed regarding the use of force? And if so, what are those limits?

It is unfortunately easy in the face of terrorism to take an expansive view regarding self-defense and the definition of legitimate target. That "ease" is magnified in the immediate aftermath of an attack when the public, media, and politicians are clamoring for aggressive responses to strike at those responsible, and to deter those considering future acts of terrorism. The rhetoric in the United States immediately after 9/11 demonstrates how such calls for aggressive responses to terrorism play out. Former U.S. Attorney General Alberto Gonzales’s disdainful description of international law as "quaint" was matched only by former Vice President Richard Cheney’s reference to waterboarding as a mere “dunk in the water.” The result was an operational counterterrorism model predicated on lawlessness and state power subject neither to the rule of law or morality. From the perspective of the “boots on the ground,” there is extraordinary danger when national decision makers adopt a paradigm best described as lawless.

The use of drones and targeted killing has further complicated the relationship between counterterrorism, self-defense, and morality in armed conflict. Many argue that the combination of modern technology and sophisticated intelligence analysis all but ensures that policy is the most effective contemporary means to conduct operational counterterrorism. The argument sounds compelling and convincing: what is more attractive than killing terrorists from the air with the use of sleek technology while minimizing risk to ground forces? We are in an age where shiny technology and seemingly sophisticated intelligence gathering and analysis converge, potentially removing the human element, and humanity, from decision making.

Should an oil company that relies on private security forces in another country to engage in torture or extrajudicial killing be held legally responsible for its actions? What about a technology company that engages in censorship of its users at the request of a repressive government? Or a corporation that degrades and depletes a country’s natural resources to extract oil or other materials, causing significant harm to an indigenous population?

These questions all highlight the important—and controversial—question of corporate accountability for human rights abuses.

Since the adoption of the Universal Declaration of Human Rights in 1948, international human rights have expanded in scope and influence. The post-World War II human rights movement’s principal aim has been to establish minimal standards for the protection of individual rights and freedoms. Over time, many human rights protections have become part of international law, either through international treaties, such as the International Covenant on Civil and Political Rights, or as customary international law, which reflects international legal obligations that arise from state, or national, practice.

International human rights standards have, however, traditionally been defined as the responsibility of nation-states. Standards such as the right to be free from torture and arbitrary detention have historically aimed at regulating relations between governments and individuals.

Corporate accountability for human rights abuses thus poses a challenge to the state-centered post-World War II human rights framework since it focuses on private, nonstate actors. Yet, the increased power and influence of corporations around the world has made it important for the human rights movement to address this challenge.

Today, approximately half of the world’s largest economies are corporations. The sheer wealth and size of corporations can give them significant influence over a country’s internal affairs, particularly in countries with weak legal institutions, lax regulatory requirements, and a history of official corruption. Corporations may themselves be complicit in human rights abuses carried out by government officials. States where the abuses take place, in turn, may resist holding corporations liable because of their participation in the abuses. Even those countries that may wish to constrain the influence of transnational corporations may lack the ability and power to do so.

The challenges in addressing corporate involvement in human rights violations at the national level underscore the importance of international human rights. Indeed, if international standards can be easily circumvented because they cannot be applied to private (corporate) actors that are complicit in abuses committed by state actors, it would jeopardize the very guarantees that the international human rights movement has fought so hard to achieve. The effective protection of human rights, in short, requires grappling with the power that corporations exercise today and the abuses that can sometimes accompany corporate activity.

The question of corporate liability is not new. After World War II, the allied powers confronted the question of whether to hold responsible IG Farben and other German companies for their complicity in Nazi atrocities. These companies were involved, for example, in the manufacture of Zyklon-B, which was used in the gas chambers, the exploitation of slave labor, and the plundering of private property.

The London Charter that created the international criminal tribunal at Nuremberg after World War II excluded corporations, concentrating instead on the personal liability of individuals. Two dozen members of IG Farben and two other German firms were indicted before a U.S. military tribunal at Nuremberg. Thirteen of those defendants were found guilty of at least one charge.

Today, international law still does not recognize criminal liability for corporations. For example, the International Criminal Court (ICC), which establishes jurisdiction over the most serious international crimes (genocide, crimes against humanity, and war crimes), provides for the liability of individuals, but not corporations. So while a corporate officer or agent may
personally be held criminally responsible for aiding and abetting human rights violations (as they were at Nuremberg), the corporation itself cannot be prosecuted before the ICC.

Corporations may, however, be held civilly liable for human rights violations in some jurisdictions, including in the United States. Under the Alien Tort Statute (ATS), any alien (i.e., non-U.S. citizen) may bring suit in a United States federal district court for “a tort ... committed in violation of the law of nations.” A federal court, in turn, may issue a judgment that the defendant violated international law and award monetary damages to the victim.

Although the ATS has been on the books since the nation’s founding, its use to enforce human rights norms is relatively recent. In its landmark 1980 decision of Filártiga v. Peña-Irala, a federal appeals court in New York ruled that Paraguayan citizens could sue a former Paraguayan police official for torture, kidnapping, and other human rights abuses that occurred in Paraguay. Since Filártiga was decided, plaintiffs have brought scores of ATS suits in U.S. courts for egregious human rights violations occurring in countries across the world.

In its 2006 decision in Sosa v. Alvarez-Machain, the U.S. Supreme Court ruled that ATS suits could proceed as long as they alleged a narrow set of well-established and universally accepted violations of international law, such as torture, extrajudicial killing, and crimes against humanity. While Sosa thus imposed limits on the range of violations that could be enforced under the ATS, it kept the door open for the statute’s future use.

A number of ATS actions have been brought against corporations for their role in human rights abuses. In one well-known case, Burmese villagers brought suit in California seeking compensation for forced labor, rape, torture, false imprisonment, and other abuses that they had endured at the hands of Burmese military units that were securing a route for the construction of a gas pipeline in Myanmar (formerly Burma). The suit charged that Unocal, and its parent company, the Union Oil Company of California, should be held civilly liable for these abuses because it knew about and benefitted from them. After years of litigation, the defendants eventually agreed to compensate the plaintiffs in a settlement.

This term, the Supreme Court is again considering the ATS, this time in a suit against a corporation. In Kiobel v. Royal Dutch Petroleum, twelve Nigerian nationals brought suit in federal court in New York against three oil companies for enlisting the Nigerian military in a widespread campaign of torture, extrajudicial killing, and illegal detention. The plaintiffs claim that the companies supported and assisted the Nigerian military in violently suppressing a grassroots movement that was protesting the companies’ operations in the Ogoni region of the Niger delta.

When the Supreme Court first agreed to hear the Kiobel case in 2011, it indicated that it would address the question of whether, and under what circumstances, corporations could be held liable under the ATS. The Court, however, has since expanded the scope of its inquiry to consider the broader question of whether noncitizens may bring suit under the ATS where the human rights violation occurs in foreign territory.

Kiobel could therefore have far-reaching consequences for the continued use of the ATS to seek redress for human rights abuses in a U.S. federal court, regardless whether corporations or individuals commit those abuses.

Whatever the result in Kiobel, plaintiffs may still seek to hold corporations liable for human rights violations in state courts. In fact, the Burmese villagers in the Unocal case obtained their settlement after the case was heading to trial in state court, where the plaintiffs had refiled suit after the federal ATS action was dismissed.

In a more recent case, victims of torture and other abuses committed at the notorious Abu Ghraib prison in Iraq sued U.S. contractors hired by the military to assist with interpretation and interrogation. The suit claimed that the corporations were complicit in the abuses, which included rape and sexual assault, beatings, forced nudity, and isolation. Earlier this year, one of the contractors, the Titan Corporation, reached a $5 million settlement with the plaintiffs after an appeals court had ruled that the suit could go forward on plaintiffs’ claims of assault and battery, wrongful death, intentional infliction of emotional harm, and other violations of state tort law.

Kiobel nonetheless suggests that corporate liability for human rights violations remains controversial. Some argue, for example, that making corporations legally responsible for human rights abuses—particularly where those abuses are committed by government officials—will increase litigation costs and make companies more risk adverse. Even the specter of litigation, critics say, can undermine corporate investment, particularly in economically developing or politically unstable countries, where such investment is sorely needed. Opponents of corporate liability argue that human rights advocates should instead focus on the government officials who actually commit the abuses and on improving conditions at the local level.

Another claim is that human rights litigation against corporations interferes with foreign policy and can create
political tensions. The U.S. Chamber of Commerce, for example, maintains that the U.S. government often encourages investment in countries with varying levels of political stability, and that efforts by human rights advocates to hold corporations accountable can undermine those governmental policies.

Other mechanisms, moreover, have emerged to facilitate corporate protection of human rights. The Voluntary Principles on Security and Human Rights, developed by governments, nongovernment organizations, and companies in the mining and energy sectors, have established guidelines for companies to maintain “the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.” These principles seek to minimize human rights abuses by security forces in conflict areas where major natural resources companies frequently operate.

The Extractive Industries Transparency Initiative, which was launched by former U.K. Prime Minister Tony Blair at the World Summit on Sustainable Development held in Johannesburg, South Africa, in September 2002, similarly aims to strengthen governance by improving transparency and accountability in the extractives industries. It thus represents another effort to advance corporate protection of human rights through a voluntary code.

Many in the business community maintain that such voluntary initiatives represent the best way to advance corporate responsibility without chilling corporate investment in development and infrastructure, particularly in more economically disadvantaged and politically unstable regions.

The question remains, however, whether such voluntary agreements are sufficient to ensure corporate compliance with human rights standards or to address the significant power that corporations can wield, particularly in countries with weak legal institutions and a history of underdevelopment or armed conflict.

Exempting corporations from liability for their complicity in human rights violations, moreover, seems at odds with other trends that have accorded corporations greater legal protections.

In its 2010 decision in *Citizens United v. Federal Election Commission*, the U.S. Supreme Court nullified a federal ban on independent campaign spending by corporations and unions. In reaching this decision, the Court held that private corporations have the same political free speech rights under the First Amendment as people. When it comes to campaign spending rights, the Court said, the “identity of the speaker is irrelevant.” The decision permits corporations to spend unlimited sums promoting or disparaging candidates for public office, thus giving corporations unprecedented influence in the electoral process.

In light of *Citizens United*, it is increasingly difficult to argue that corporations should have the same rights as individuals when it comes to matters such as free speech, on the one hand, but should not be held to the same international human rights standards as individuals on the other.

The United States’ treatment of terrorist organizations reinforces this point. U.S. efforts since 9/11 to hold terrorist groups responsible for the commission of war crimes—and thus to treat them like state actors in past wars—underscores the limitations of theories that tie legal responsibility to official government action.

As the United Nations High Commissioner for Human Rights has said, “Corporations are not immune from responsibility under international law if they engage in, or are complicit in, conduct amounting to international crimes, such as genocide, crimes against humanity, or war crimes.”

Holding corporations accountable for human rights violations raises difficult issues. But excusing corporations from human rights standards even where they assist in the commission of egregious abuses ultimately jeopardizes the efficacy of those standards. In the end, the focus should remain on the enforcement of human rights guarantees rather than on the status of the perpetrator.

Jonathan Hafetz is an associate professor at Seton Hall University School of Law. He lectures widely on civil liberties and human rights and testified in Congress on such matters. He is the author of *Habeas Corpus After 9/11: Confronting America’s New Global Detention System*. 

An Afghan contractor unloads equipment in Kandahar in 2012. Photo courtesy of the U.S. Department of Defense via Wikimedia Commons.
Q: How did the American Civil Liberties Union participate in your father’s case?

Mr. Ernest Bessick was the Executive Director of the Northern California affiliate of the ACLU. He had been looking for a test case regarding the Japanese Internment, and saw that my father had been arrested in San Francisco, and asked him if he would be willing to challenge his case further. My father couldn’t believe that somebody he didn’t know wanted to help him.

Mr. Bessick took my father’s case against the wishes of the national ACLU director, Roger Baldwin. Baldwin felt it was outside the scope of work of the ACLU, which generally filed amicus briefs, or “friend of the courts” briefs, rather than representing clients. He also did not want to challenge the government. Everyone wanted to be supportive of President Roosevelt.

Mr. Bessick was instrumental in recruiting Wayne Collins, the attorney who actually took the case to the Supreme Court. The irony of this story is that the National ACLU later awarded my father the Roger Baldwin Liberty Medal Award. So some things come full circle, right?

Q: Your father’s case was reopened in 1983. How did that come about?

In 1982, (University of California San Diego emeritus) Professor Peter Irons examined the case records as research for a book he was writing. He discovered a document that was a Department of Justice memo to President Roosevelt saying that there was no military necessity for Japanese Americans to be removed from their homes. This document had not been available when my father’s case was heard before the Supreme Court in 1944.

Professor Irons didn’t even know my father was still living. There were two other Supreme Court cases that had to do with curfews, involving Gordon Hirabayashi and Minoru Yasui. All three cases were reopened under the legal term Coram Nobis, or Writ of Error, which means “an error has been made before us.” You have to have already served your entire sentence, as well. My father’s original sentence was seven years of probation.

Q: Will you tell us about the Korematsu Institute?

I cofounded the Institute in 2009 as a way to further my father’s legacy, and to give back to the community. The Asian Law Caucus, which is the oldest nonprofit Asian American legal organization in the United States, was also part of my father’s legal team, so I established the Institute with them. My father always believed in education, because he felt in order for something such as the Japanese American Internment not to happen again, people needed to know what happened. If we don’t learn our history, then we’re doomed to repeat it.

In 2010, California legislation established January 30, my father’s birthday, as Fred Korematsu Day of Civil Liberties and the Constitution. The day would be celebrated annually, statewide. Because the day would include K–12 educators, we developed curriculum kits, which teachers now can go online at www.korematsuinstitute.org and order for free. We began receiving requests, not just from California teachers, but from teachers all over the world.

Q: Fred Korematsu Day has also grown beyond California to other states and cities. Can you talk more about that and what you hope to see happen with that day?

It’s very exciting. There is a grassroots swell going on for Fred Korematsu Day. Just this year on January 30, the governors of Michigan, Georgia, Utah, and Hawaii declared Fred Korematsu Day in their states. Korematsu Day is a day of recognition and an opportunity for education about stories of the Japanese American Internment and how it relates to issues of national security and immigration.

Q: Is there anything else that you want our readers to know about your father?

My father was very humble. When he received the Presidential Medal of Freedom, a White House official called my parents’ house, inviting them to Washington, D.C., the following year, 1998. After he looked at the practicalities of such a trip, my father said to my mother, “Tell President Clinton to send the Medal to me in the mail.” In the end, we got him there! If my father were here, sitting here talking to you, he would remind people to stand up for what is right: “If you see something wrong, don’t be afraid to speak up.”
WHAT’S ONLINE?

Download Handouts—All of the handouts mentioned in this issue are available in one location. Go get them!

Dive Deeper—Link to other organizations, articles, and comprehensive reports to learn more about law and war.

Listen—Connect to a free podcast from Backstory with the American History Guys about ending wars in U.S. history.

Mark Your Calendar

Nominate “Profiles”
Know an innovator in the classroom? A dynamic expert in the field? Please let us know.

Read More
Learn more about the legalities of war and other topics related to this issue.

Tell Us What You Think!
Propose topics for future issues, share your ideas for the classroom, or tell us your favorite feature of the magazine.

Stay Connected!
For instant updates, become a fan of the ABA Division for Public Education on Facebook and follow us on Twitter! Just click on the Facebook and Twitter icons at www.insightsmagazine.org.
Law and the Second Amendment

*Insights* will take an in-depth look at the Second Amendment of the U.S. Constitution, including its history, case law, and connections to American culture.